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OFFICE OF THE SECRETARY

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May 16, 2001

Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth St., S.W.
Washington, D.C. 20554

**Re: Western Wireless Corp. Petition for Designation as an
Eligible Telecommunications Carrier for the Pine Ridge
Reservation in South Dakota, CC Docket No. 96-45**

Dear Ms. Salas:

On behalf of Western Wireless Corp. ("Western Wireless"), I am writing to notify you of two *ex parte* presentations regarding the proceeding referred to above: (1) yesterday, to Commissioner Gloria Tristani and her legal assistants, Sarah Whitesell and Adam Krinsky; and (2) today, to Carol Matthey, Deputy Chief, Common Carrier Bureau ("CCB"); Katherine Schroder, Chief, Accounting Policy Division ("APD"), CCB; Anita Cheng, Associate Chief, APD, CCB; Gene Fullano of the APD, CCB; and Andrea Kearney of the Office of General Counsel. Participants in these presentations on behalf of Western Wireless included Gene DeJordy, Vice President, Regulatory Affairs, Western Wireless; Mark Rubin, Executive Director, Federal Affairs, Western Wireless; my colleague, Michele Farquhar; and myself (in today's meeting only). In addition, Gary Janis and Tom Collins of the Oglala Sioux Tribe participated in the meeting with Commissioner Tristani.

The meetings included a video presentation regarding Western Wireless' Tate Woglaka offering on the Pine Ridge Reservation. The videotape will be submitted in the record under separate cover. The meetings also covered the issues summarized in the attached handout. Among other matters, Western Wireless stressed the need for an expeditious grant of the petition, given the need for certainty before proceeding with construction of additional cell sites, which must commence by September to be complete before harsh weather makes construction impossible. The new cell sites are needed to provide service to the most remote

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areas of the reservation, where a very high percentage of residents have no telephone service. In addition, Western Wireless noted, as an additional public interest factor relating to the petition, that its network on the Pine Ridge Reservation is capable of transmitting using "2½G" cellular technology, including data transmission at speeds of up to 150 kbps, and that Western Wireless plans to deploy such technology throughout the Reservation in the near future.

If you have any questions, please contact me.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David L. Sieradzki".

David L. Sieradzki
Counsel for Western Wireless Corp.

Enclosures

cc: Commissioner Gloria Tristani
Sarah Whitesell
Adam Krinsky
Carol Matthey
Katherine Schroder
Anita Cheng
Gene Fullano
Richard Smith
Andrea Kearney

WESTERN WIRELESS' PETITION FOR DESIGNATION AS AN ETC FOR THE PINE RIDGE INDIAN RESERVATION IN SOUTH DAKOTA

Background

- The FCC recently acted to remedy the problem of limited access to telecommunications by Native American residents of U.S. tribal lands:
 - ◆ Encouraged carriers to intensify efforts to serve Native American communities.
 - ◆ Adopted new universal service subsidy mechanisms to support basic telephony on Indian reservations, including new support that will allow \$1-per-month access to universal service on tribal lands.
 - ◆ Adopted policy recognizing FCC responsibility under federal trust relationship with Indian tribes and government-to-government relationship with tribes.
- Western Wireless, a cellular provider serving primarily rural areas in western states, responded to the FCC's initiative to help improve tribal telephone service:
 - ◆ Sought FCC designation as an eligible telecommunications carrier ("ETC") to provide subsidized universal service on the Crow Reservation, Montana. (8/4/99)
 - ◆ Sought FCC designation as an ETC to provide subsidized universal service on the Pine Ridge Reservation, South Dakota. (1/19/01)
 - ◇ Signed agreement with the Oglala Sioux Tribe to provide the Tate Woglaka ("Talking Wind") universal service offering at the Pine Ridge Reservation. The agreement gives the Tribe a significant role – and meaningful benefits – for assisting in the provision of service on the Reservation.
 - ◇ Provides service (at a loss) to over 1,000 Pine Ridge Reservation residents under the Tate Woglaka Agreement for a flat \$14.99 per month, even though Western Wireless has yet to be designated as eligible for universal service support.

⇒ Unfortunately, Western Wireless' Tate Woglaka customers on the Pine Ridge Reservation cannot receive \$1-per-month access to universal service until Western Wireless is designated as an ETC.

FCC Designation – Jurisdiction

- While state commissions typically designate carriers as ETCs to receive universal service support, the FCC has jurisdiction to designate carriers "not subject to the jurisdiction of a State commission" as ETCs under 47 U.S.C. § 214(e)(6).

- ◆ The FCC has already exercised its Section 214(e)(6) jurisdiction to designate as ETCs tribally owned carriers providing universal service to tribal lands.
- ◆ For other carriers, such as Western Wireless, the FCC has decided that it will first determine whether there is a lack of state jurisdiction to trigger Section 214(e)(6), and then address whether the substantive ETC criteria are met.
- South Dakota lacks jurisdiction over Western Wireless' provision of universal service on the Pine Ridge Reservation under the Tate Woglaka Service Agreement.
 - ◆ The FCC must apply a balancing test between state and tribal/federal interests to decide whether the state has jurisdiction over the Tate Woglaka offering under *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), and other cases.
 - ◆ Is an on-reservation activity by a non-Indian such as Western Wireless subject to state or tribal jurisdiction? Under governing law, the answer depends in large part on whether the other parties to the transaction are Indian or non-Indian.
 - ◇ The vast majority (over 90%) of residents of the Pine Ridge Reservation (and of Western Wireless' existing and prospective customers) are Indians (although Western Wireless, as an ETC, would have to serve all residents that request service).
 - ◇ Western Wireless provides the Tate Woglaka offering under agreement with the Oglala Sioux Tribe, which derives substantial benefits from the offering, including financial proceeds, training, and employment preferences.
 - ◇ The vast majority of Reservation land is either owned by, or held by the federal government in trust for, the Tribe and its members.
 - ◇ The Tate Woglaka Offering is governed by the Tribe's legal jurisdiction and regulatory authority.
 - ◇ The Oglala Sioux Tribe has not consented to state jurisdiction. The South Dakota Supreme Court has ruled that the state does not have jurisdiction over Indian country, nor may it exercise partial jurisdiction over the reservation portion of infrastructure that merely passes through tribal lands (*South Dakota v. Spotted Horse*, 462 N.W.2d 463, 467 (S.D. 1990)).
 - ◇ Because Western Wireless is a commercial mobile service provider, the state is barred under 47 U.S.C. § 332(c)(3) from exercising rate and entry authority which, though not eliminating South Dakota's jurisdiction, minimizes its regulatory interest in the Tate Woglaka Offering.

FCC Designation – Other Issues

- Designating a non-tribally owned carrier on an Indian reservation is not unduly complex nor outside the realm of typical FCC decision-making – there are well-developed legal principles that the FCC can readily apply.

- The *Twelfth Report and Order*'s prohibition on carriers seeking ETC designation for tribal lands from both the FCC and the state does not bar the Pine Ridge Petition.
 - ◆ Western Wireless' Tate Woglaka offering on the Pine Ridge Reservation is jurisdictionally distinct from its universal service offerings elsewhere in South Dakota, for which it sought ETC designation by the state commission.
 - ◆ Many of the factors identified above apply here as well (e.g., the agreement with the Tribe to provide service under tribal jurisdiction).
- The FCC has already found that Western Wireless' use of its cellular infrastructure to provide the services and functionalities that make up "universal service" satisfy the statutory and regulatory criteria.
- Designation of Western Wireless as an ETC on the Pine Ridge Reservation would advance the public interest.
 - ◆ The Oglala Sioux Tribal Council, on behalf of the members of the Tribe that make up the overwhelming majority of the Pine Ridge population, has already signaled its support of the Tate Woglaka Offering.
 - ◆ Over 1,000 customers, over 42% of whom previously lacked telephone service, have signed up for the Tate Woglaka Offering in the few months since Western Wireless began providing the service.
 - ◆ The Tate Woglaka Offering is improving the low telephone penetration on the Pine Ridge Reservation.
 - ◆ The Tate Woglaka Offering brings to the Reservation an expanded calling area and competition among providers of universal service, which in turn brings lower prices, improved customer service, and incentives for telecommunications providers to pursue technological advances.
- The FCC can designate Western Wireless as an ETC for just the Pine Ridge Reservation, even though the Reservation borders bisect the study areas of the incumbent rural telephone companies.
 - ◆ Just as each state has designated ILECs whose study areas cross state lines for only that portion of the study area within each state's borders, so the FCC can designate Western Wireless within the boundaries of the Reservation.
 - ◆ If necessary, the FCC could use Section 10 to forbear from applying the Section 214(e)(5) requirement that Western Wireless serve the whole of the rural incumbents' study areas. The statutory forbearance requirements are met: (1) the Section 214(e)(5) requirement is not necessary to ensure reasonable rates, (2) nor is it needed to protect consumers, and (3) the Tate Woglaka Offering confers significant public interest benefits and advances federal policy objectives.